(4) (3)

Nos. 03-1521, 03-1532

AUG 13 2004

IN THE

Supreme Court of the United States

VISA U.S.A. INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

MASTERCARD INTERNATIONAL INCORPORATED,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CHEVRONTEXACO CORPORATION AND SHELL OIL COMPANY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a loyalty rule adopted by a joint venture prohibiting its members from competing directly with the venture violates section 1 of the Sherman Act, when the rule does not result in increased prices or reduced output in the consumer market in which the venture's members compete.

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INTEREST OF THE AMICI CURIAE

Amici ChevronTexaco Corporation and Shell Oil Company (or their affiliates) engage in exploration, production, refining, marketing, and transportation of oil and gas; chemicals manufacturing and sales; and power generation.

Like many other companies, amici have relied on joint ventures to obtain efficiencies and compete more effectively in their global markets. Like the collaborations in this case and in other industries, the agreements creating these ventures typically include provisions that the venture members will contribute to the venture's success and not compete against it. Such provisions have long been recognized as procompetitive. The decision below, however, strikes down such a provision under a standard that dramatically differs from that applied by other courts to uphold indistinguishable provisions. Moreover, the standard applied by the Second Circuit creates uncertainty over the validity of other provisions commonly found in joint venture agreements. The result is a circuit conflict that leaves companies such as amici without clear guidance as to when their joint venture activities will be subjected to treble antitrust damages.

Because the willingness of companies such as amici to enter beneficial joint ventures depends on the existence of clear, predictable, and nationally uniform rules, amici urge the Court to grant certiorari and bring needed certainty to this important area of antitrust law.[1]

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[1] This brief was not authored in whole or in part by counsel for any party, and no one other than the amici made a monetary contribution to its preparation or submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Joint ventures are a vital part of the national economy. They enable companies to create new products that would otherwise not exist and to enter, and foster new competition in, markets that otherwise would not be open to them. Just as importantly, joint ventures can create efficiencies that benefit consumers by increasing output and lowering prices. Recognizing these procompetitive benefits, this Court and others have applied the antitrust laws in a manner conducive both to the formation of bona fide joint ventures and to the adoption by those ventures of rules designed to enhance their effectiveness.

The Second Circuit, in a decision that sharply conflicts with decisions of other courts of appeals, has departed from this law. The court has declared unlawful joint venture rules not meaningfully different from rules other courts have upheld as a matter of law, and has done so under a standard that casts a long shadow over the validity of joint venture activities generally. Whereas other courts and leading commentators have treated restraints ancillary to a legitimate joint venture as presumptively lawful, the Second Circuit ruled that such restraints are "exemplars" of the kind of conduct condemned by the Sherman Act. Starting from that premise, the court found the loyalty rules at issue here to be unlawful despite the presence of robust competition from well-funded and successful rival firms and despite the absence of any evidence that the rules at issue could ever foreclose those competitors from continuing to develop their products and market them to consumers in vigorous competition with the joint venture and its members.

The Second Circuit's decision places companies that are engaged in, or contemplating, joint venture activities in an untenable position. Before the Second Circuit's decision, such companies could predict with some confidence that, where they faced strong competition and their activities did

not foreclose competitors from access to consumers, restraints such as the loyalty rules at issue here would be upheld. Following the Second Circuit's decision, no such confidence is possible. Companies have no way of predicting the standard under which their activities will be judged or the factors the court will consider important in evaluating their competitive effects. This uncertainty will inevitably deter firms from engaging in beneficial, procompetitive ventures of the kind the antitrust laws were intended to protect. Review by this Court is necessary to prevent this result and to restore the proper interpretation of the antitrust laws as applied to restraints ancillary to joint ventures.

ARGUMENT

I. THE CIRCUITS ARE SPLIT ON A QUESTION THAT REQUIRES CLEAR, NATIONALLY UNIFORM RULES

This Court has long recognized the need for predictable, workable antitrust rules. Without such rules, businesses cannot conduct their affairs with any certainty and may refrain or withdraw from beneficial activities out of fear of after-the-fact imposition of treble antitrust damages. In some circumstances, where experience has shown that a particular restraint is not likely to have any redeeming qualities, certainty and predictability have been served by holding the restraint to be per se illegal. *E.g., Arizona v. Maricopa County Med. Soc'y,* 457 U.S. 332, 343-44 (1982) (application of per se rule to naked horizontal price-fixing agreements furthers "business certainty and litigation efficiency").

By the same token, where the conduct at issue is likely to have competitive value, the Court has achieved predictability by adopting rules that recognize and give weight to that value. Last Term, for example, the Court brought needed certainty to the much-litigated question of a company's liability under section 2 of the Sherman Act for refusing to

deal with its rivals. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 124 S. Ct. 872 (2004). Rejecting the Second Circuit's adoption in that case of a wide-open standard of such liability, this Court refused to extend the refusal-to-deal holding of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to instances where no prior voluntary course of dealing existed, rejected application of the essential facilities doctrine where access to the facility at issue is already guaranteed by other law, and held that "monopoly leveraging" is not an independent basis for section 2 liability. In doing so, the Court noted that the antitrust laws should not be applied in a manner that discourages innovation and beneficial investment activities. 124 S. Ct. at 879. The Court warned that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Id.* at 882 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

These same principles apply here. Joint ventures are commonly recognized as providing a useful means of achieving pro-consumer business objectives favored by the antitrust laws. As in this case, they can result in the creation of new products that individual members of the venture could not create on their own. *E.g., Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979) ("*BMI*"). They can also enable companies to achieve crucial and procompetitive efficiencies by (among other things) eliminating redundancies, obtaining economies of scale, and facilitating access to complementary resources. *E.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (joint purchasing venture "permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice"); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)

("[M]ergers, joint ventures and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively."); *NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984) ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive"); Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have achieved on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture."). As observed by leading antitrust commentators, "the legal and economic literature on joint ventures is largely favorable." XIII H. Hovenkamp, *Antitrust Law* ¶ 2121b, at 117-18 (1999).

Because of their generally procompetitive nature, joint venture activities should be evaluated under rules that are clear and that do not "chill the very conduct that the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. This Court's decisions have established that restraints ancillary to legitimate joint ventures are to be judged under the rule of reason. *See NCAA*, 468 U.S. at 101-03; *BMI*, 441 U.S. at 20-24. But in the two decades since those decisions, the Court has not provided significant further guidance as to the structure or content of the applicable analysis. Nor has the Court addressed how it should be applied to restraints of the kind at issue here, which restrict the degree to which venture members can compete with the venture itself.

The result is that a sharp conflict has developed in the lower courts. Whereas the court below found Visa and MasterCard's loyalty rules to be unlawful, the Tenth Circuit rejected as a matter of law an essentially identical challenge to a Visa rule that is the functional equivalent of the rules at issue here. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) ("*MountainWest*"). Likewise, in sharp

contrast to the decision below imposing antitrust liability, the D.C. Circuit in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), upheld a joint venture rule against competing with the joint venture that was remarkably similar to the loyalty rules here. The Seventh Circuit analogously upheld a non-competition agreement ancillary to a joint venture in *Polk Bros. Inc. v. Forest City Enters.*, 776 F.2d 185, 191 (7th Cir. 1985).

These conflicting decisions cannot be dismissed as turning on differing facts. Rather, they reflect the application of fundamentally different, and conflicting, antitrust standards. In upholding Visa's loyalty rule in *MountainWest*, the Tenth Circuit analyzed the competitive harm issue as one of foreclosure—*i.e.*, did the rule prevent competitors from offering competing products to consumers? Thus, the Court relied primarily on the fact that Visa's loyalty rule did not "bar Sears from access to th[e] market." 36 F.3d at 971. The court noted that the market in general purpose credit cards was highly competitive, "with issuers targeting different consumer groups and consumer needs. In this market, Sears already competes vigorously." *Id.* at 972. Given this competition, the court dismissed as irrelevant Sears' claim that access to Visa member banks would permit it to "compete *more effectively*." *Id.* (emphasis in original). The court instead found it dispositive that "[t]here was no evidence Sears could only introduce a Prime Option card with Visa USA's help or that Visa USA's exclusion from its joint venture disabled Sears from developing its new card under the Discover mantle." *Id.* at 971. Similarly, in upholding the rule in *Rothery*, the D.C. Circuit relied principally on the defendant's inability to reduce output by foreclosing other competitors from providing their service to consumers. 792 F.2d at 217. And in upholding the non-competition agreement in *Polk Bros.*, the Seventh Circuit found pivotal the lack of any contention that the agreement reduced output in a substantial portion of the market. 776 F.2d at 191.

In finding competitive harm in the present case, the Second Circuit took the opposite approach. Rather than finding it dispositive that competitors were not foreclosed from reaching consumers, the Second Circuit deemed it irrelevant "that Amex and Discover can get their products to consumers, as evidenced by the fact that they are respectively the largest and fifth largest issuers of payment cards in the United States." Visa Pet. App. 19a. Similarly, whereas the Tenth Circuit placed no significance on the fact that Sears was excluded from issuing its card through Visa member banks, the Second Circuit found such exclusion to be the "most persuasive evidence of harm to competition." Visa Pet. App. 16a. The Second Circuit likewise concluded that Visa's loyalty rules could *not* be upheld on the ground that they merely harmed the ability of Amex and Discover to compete more effectively in the robustly competitive credit card market. Visa Pet. App. 21a.

The differing approaches of the Seventh, Tenth, and D.C. Circuits, on the one hand, and the Second Circuit, on the other, are also manifest in their treatment of the efficiency justifications offered for the restraints at issue. The D.C. Circuit required only that the restraint "serve[] to make the main transaction more effective" and that it "be related to the efficiency sought to be achieved." *Rothery Storage*, 792 F.2d at 224. It rejected the notion that "courts should calibrate degrees of reasonable necessity." *Id.* at 227; *cf. NFL v. NASL*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of certiorari) ("The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity."). In finding valid the defendant's justification of the rule as preventing free-riding, the court relied on the "tendency" of the rule to accomplish that goal, noting that absent the loyalty rule, the venture "*might* well [find] it desirable, or even essential, to decrease or abandon many [of its] services." 792 F.2d at 222 (emphasis added). Similarly, the Seventh Circuit relied upon the "control of free riding," and found that the rule there was "at least

potentially beneficial to consumers." *Polk Bros.*, 776 F.2d at 190 (emphasis added). The Tenth Circuit likewise stated that the restraint must be "reasonably related" to the venture's operation. *MountainWest*, 36 F.3d at 970. Quoting *Rothery*, the Tenth Circuit relied on the fact that the joint venture members adopted the loyalty rule to make "'the main transaction *more effective in accomplishing* its purpose,' which is to provide credit card services to its members." Id. (emphasis added) (quoting *Rothery*, 792 F.2d at 224). And both the Tenth and the D.C. Circuits warned against an open-ended judicial balancing of alleged competitive harms and benefits. *Rothery*, 792 F.2d at 229 n.11 ("[w]eighing effects in any direct sense will usually be beyond judicial capabilities"); *MountainWest*, 36 F.3d at 972 (declining to wade into a "vast sea of commercial policy").

The Second Circuit applied a fundamentally different standard. Rather than finding it sufficient that the restraint be related to the venture goals and serve to make the venture more effective, the court applied a rule of necessity. Visa Pet. App. 22a (affirming district court's ruling that the loyalty rules were not "*necessary to accomplish*" the venture's goal) (emphasis added). Thus, it gave short shrift to the same justifications the other circuits accepted as valid, observing that the evidence did not show that Visa and MasterCard could not function effectively without the loyalty rules. *Id.* And it not only expressed no hesitation in venturing into an abstract weighing of alleged competitive effects, but it also placed the burden on the defendants to justify the rules rather than on the plaintiff to prove their invalidity. *Id.* ("In sum, the defendants have failed to show

that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits.").[2]

At bottom, these conflicting decisions stem from a fundamental difference in the lens through which the courts viewed the restraints. Although each purported to be applying a rule of reason, they started from dramatically different focal points. The Second Circuit viewed the restraint as nothing more than a "horizontal restraint adopted by 20,000 competitors" and thus an "exemplar[] of the type of anticompetitive behavior prohibited by the Sherman Act." Visa Pet. App. 20a. The court pejoratively described the Visa and MasterCard members as acting to protect their "combined interests" (*id.*), without acknowledging that the "combined interest" here is a bona fide, procompetitive joint venture involving true integration that has created valuable products that no individual member could provide on its own. The court nowhere discussed the favorable treatment the courts have long given to such restraints that are "ancillary" to the operation of a joint venture, as opposed to naked restraints unaccompanied by any cooperative business enterprise. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-82 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Indeed, in labeling the rules here "exemplars" of illegal horizontal conduct, the Second Circuit perversely relied upon the very decisions of this Court and others (including the D.C. Circuit in *Rothery*) that have recognized that restraints ancillary to joint ventures are *not* to be viewed the same as horizontal restraints unrelated to such ventures. *See* Visa Pet. App. 20a (citing, *e.g.*, *NCAA*, 468 U.S. at 99; *Rothery*, 792 F.2d at 214).

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[2] Other courts have correctly recognized that the burden to prove invalidity rests on the plaintiff. *E.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 67 (D.C. Cir. 2001).

Improper antagonism to joint venture activities similar to that displayed by the Second Circuit is also evident in a recent Ninth Circuit ruling. In a split decision, a Ninth Circuit panel majority (per Judge Reinhardt) ruled that decisions by a joint venture as to the pricing of the venture's own products could be found *per se* illegal as purported horizontal price-fixing between the venturers. *See Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108 (9th Cir. 2004) (petition for rehearing pending).[3]

In stark contrast to this kind of judicial hostility, the Seventh, Tenth, and D.C. Circuits recognized that restraints related to joint ventures raise different considerations from horizontal restraints unrelated to such ventures. Rather than treating restraints ancillary to joint ventures as exemplars of illegal conduct, these other circuits have rejected the assertion that illegality should be presumed from the fact that competitors have acted collectively. The Tenth Circuit ruled that such analysis "misses the point in the context of joint ventures." *MountainWest*, 36 F.3d at 968. The court observed, "[t]he very existence of a joint venture in the first instance is premised on a pooling of resources to affect competition in some manner and is made functional through some form of cooperative behavior or rule-making." *Id.* The D.C. Circuit in *Rothery* similarly recognized that, unlike

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[3] The ventures in that case were between Shell and Texaco and involved a complete integration of the companies' operations for producing and selling motor gasoline. They had been approved after antitrust review by the Federal Trade Commission and various state attorneys general. The panel majority, however, held not only that decisions by the ventures as to the pricing of the ventures' own gasoline products were subject to section 1 scrutiny as a "conspiracy" between the venture owners, but also that such pricing might be illegal per se. 369 F.3d at 1124. Although involving a separate issue from that presented here, the Ninth Circuit's decision is emblematic of the failure of some lower courts to accord proper scope for legitimate joint venture activities and of the need for this Court's intervention.

naked horizontal restraints that are generally condemned by the antitrust laws, horizontal restraints in the context of joint ventures must be evaluated differently and in a manner that accounts for their efficiency justifications. 792 F.2d at 228. The court observed that this Court's decisions in *BMI*, *NCAA*, and *Northwest Stationers* have returned the law to the "original understanding" that "integrations or partnerships with restraints like Atlas' [are] not only lawful but desirable." *Id.* at 223. As the Seventh Circuit concluded in *Polk Bros.*, "[t]his was productive cooperation." 776 F.2d at 190. Likewise, in a decision that the Second Circuit remarkably cited as supporting its conclusion that the rules here are exemplars of illegal conduct, the First Circuit observed that it would be "clearly inappropriate" to analyze joint venture arrangements based on "precedents dealing with arrangements between existing independent competitors." *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58 (1st Cir.), *cert. denied*, 537 U.S. 885 (2002).

As a consequence of these sharply opposing decisions, and the lack of any significant recent guidance from this Court, companies engaged in or contemplating joint venture activities have no way of evaluating with any certainty how their activities will be judged. Will restraints ancillary to their joint venture be viewed as presumptively lawful or as exemplars of illegal conduct? What weight will the court give the existence or nonexistence of foreclosure from access to the consumer market? Will the court view it as essentially irrelevant as the Second Circuit did, or as critical as the Seventh, Tenth, and D.C. Circuits did? Under what standard will the court evaluate the "necessity" of the rule to the venture's success? The circuit courts are sharply split on these and other critical questions.

The resulting uncertainty is intolerable. Businesses should not be left to make critical decisions without any basis for knowing whether their joint venture activities will be found permissible or will be subject to expensive antitrust litigation and the threat of treble damages if their guesses are

found after-the-fact to have been wrong. As the government itself recently recognized, "[c]lear and objective guidance on the standards of [antitrust] liability can certainly benefit both businesses and consumers" and the absence of such guidance can "lead to challenges to procompetitive programs and prospectively chill [their] adoption." Brief for United States as Amicus Curiae at 18, *3M Co. v. LePage's Inc.*, No. 02-1865 (filed May 28, 2004). The government's observations apply fully here. Only resolution by this Court can provide the necessary uniformity and predictability in this vitally important area of antitrust law.[4]

II. THE SECOND CIRCUIT ERRED BY TREATING JOINT VENTURE LOYALTY RULES ANALOGOUSLY TO AN AGREEMENT AMONG COMPETITORS ENGAGED IN NO LEGITIMATE COLLABORATION

The fundamental flaw in the Second Circuit's analysis was its treatment of the loyalty rules as exemplars of illegal horizontal conduct. As a result of that starting premise, the Second Circuit failed to recognize the fundamentally different considerations that apply to joint venture activities, as opposed to restraints adopted by competitors that are *not* members of a legitimate joint venture.

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[4] In the 3M case, the government urged that the Court deny certiorari because the issues involving bundled rebates presented there were "novel and difficult" and would "benefit from further judicial and scholarly analysis" before this Court's intervention. *Id.* at 8, 15. No such factors counsel against certiorari here. The issues related to restraints ancillary to joint ventures are neither novel nor difficult. They have been the subject of numerous judicial opinions and scholarly articles and are now the subject of sharply conflicting lower court decisions. And, in contrast to the government's assertion regarding bundled rebates, joint ventures and their associated restraints such as the rules here are a common and important part of the national economy on which definitive guidance is urgently needed. The questions presented here are fully ripe for this Court's review.

Indeed, where (as is concededly true in this case) the joint venture is itself lawfully formed, the operation of the venture itself is generally not subject to section 1 scrutiny at all because the venture's decisions are those of a single entity rather than separate actors. *See, e.g.*, VII P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1477, at 316 (2d ed. 2003) (where joint enterprises "are buying and selling in their own right, they can fairly be regarded as single entities whose selling decisions are not 'price-fixing conspiracies' and whose buying decisions are not 'boycott conspiracies'"); *Maricopa County Med. Soc'y*, 457 U.S. at 356 (a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . [can be] regarded as a single firm competing with other sellers in the market"); *Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 270 (8th Cir. 1988) (members of electric cooperative were not subject to section 1 claim based on alleged "price-squeeze conspiracy").[5]

In cases such as this, where the restraint at issue not only governs the venture's own operation but also affects the venture members' conduct, courts have applied section 1 scrutiny, as the Second Circuit did here. *See Rothery*, 792 F.2d at 214-15. But recognizing the applicability of section 1 does not require resort to the opposite extreme of treating the restraint as presumptively unlawful. Even if a joint

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[5] The Ninth Circuit failed to recognize this principle in its recent *Dagher* decision involving the former joint ventures between Shell and Texaco. As Judge Fernandez's forceful dissent aptly described the result of the panel majority's decision, "[w]e now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business – sets prices for its own goods – it subjects its otherwise insulated members to the severe sting of antitrust liability." *See Dagher*, 369 F.3d at 1127 (Fernandez, J., dissenting).

venture is not deemed a single entity for certain purposes and thus not exempted from section 1 scrutiny altogether, the venture nonetheless is a legitimate business with its own identity. As a bona fide business entity, it should not be handicapped in its competitive efforts by a rigid analysis that fails to recognize its legitimate business goals. In particular, joint ventures should not be prevented from adopting business practices that commonly are adopted by their competitors and that the antitrust laws recognize as procompetitive.

Loyalty rules are one such practice. It is common in many industries for suppliers to enter into exclusive dealing arrangements with distributors, in which the distributors agree not to distribute the products of competing suppliers. The courts have long recognized that such arrangements "may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("[t]here are . . . well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition"). Accordingly, such arrangements are upheld if competition is robust and competitors are not substantially foreclosed from reaching consumers. *See, e.g.*, *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 80 (2d Cir. 1999); *Omega*, 127 F.3d at 1163; *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1572-73 (11th Cir. 1991). This is true even if the exclusive dealing arrangement makes unavailable to competitors a particular distribution method they may view as desirable. *E.g., Omega*, 127 F.3d at 1163 ("If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market.") (emphasis in original); H. Hovenkamp, *Federal Antitrust Policy* § 10.9, at 438 (2d ed.

1999) (foreclosure of even "a large percentage of one mode of distribution will have little anticompetitive effect if another mode is available").

Properly viewed, the loyalty rules here are the equivalent of an exclusive dealing arrangement that any single firm (including Discover or Amex) might seek for its product. They are supported by the same procompetitive justification of enhancing interbrand competition by encouraging venture members to channel their resources to strengthening the venture's brand. Their anticompetitive effect, if any, and ultimate validity should be evaluated under the same standard. A joint venture should not be prevented from seeking to ensure the loyalty of its members simply because it is a joint venture. The ultimate question is whether the joint venture's rules preclude competitors from developing their own products and selling to consumers in competition with the venture. If competitors are not so foreclosed, competition has not been injured—whether or not the rule was adopted "horizontally" among joint venture members as part of the venture rather than agreed to "vertically" between a supplier and its distributors.

The Tenth Circuit correctly recognized as much in *MountainWest,* when it upheld Visa's rule on the ground that it did not bar Sears from developing its own products or from continuing to sell to consumers and compete vigorously in the market. 36 F.3d at 971-72. The D.C. Circuit also recognized as much in *Rothery,* when it upheld Atlas's rule after finding that it could not result in decreased output because of the ability of competing moving companies to provide services to consumers. 792 F.2d at 217. Other courts and commentators have similarly recognized that "[j]oint venture partners have a legitimate interest in ensuring that all parties refrain from harming the venture by competing within its scope of operations," and that loyalty rules therefore "usually should be upheld." Piraino, *Reconciling Competition and Cooperation*, 35 Wm. & Mary L. Rev. at 931; *id.* at 925; ABA Section of Antitrust Law,

Antitrust Law Developments 444-45 & n.217 (5th ed. 2002); *cf. Chicago Prof'l Sports, Ltd. v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996) ("no one expects a McDonald's outlet to compete with other members of the system by offering pizza") (Easterbrook, J.); *NFL v. NASL*, 459 U.S. at 1078 ("I cannot believe the Court of Appeals would expect a law firm to countenance its partners working part-time at a competing firm while remaining partners. . . . It is difficult for me to understand why the cross-ownership rule [preventing NFL owners from owning teams in a competing soccer league] is not valid under this standard.").

This Court should grant certiorari to reject the Second Circuit's departure from these principles and to remove the cloud of uncertainty the Second Circuit's opinion creates for joint ventures that seek to adopt rules to further their success on the same basis as other business entities.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

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August 13, 2004